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No. 87-1268

In The

Supreme Court of the United States

October Term, 1987

FRED L. WORTH,

Petitioner,

vs.

SELCHOW & RIGHTER COMPANY, HORN ABBOT, LTD., et al.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Petitioner's statement of the questions presented suggests that the validity of his copyright protection was an issue below when, in fact, it was not. Respondents, for purposes of their summary judgment motion, conceded that petitioner had valid copyright protection, and that his works were used by respondents as fact reference sources during the composing of questions and answers for the *Trivial Pursuit* board game.

A properly-framed statement of the question presented is:

> Whether the Court of Appeals and the District Court, when ruling on respondents' motion for summary judgment, properly concluded that petitioner's copyrighted compilations of alphabetically-listed "trivial facts" were not infringed by the *Trivial Pursuit* board game, including its question and answer cards, since only factual content and not copyrighted expression was utilized.

RULE 28.1 STATEMENT

Respondent Selchow & Righter Company is a wholly-owned subsidiary of Coleco Industries, Inc., of West Hartford, Connecticut. Respondent Horn Abbot, Ltd. has no parent, subsidiary or affiliated corporations.

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The petition for writ of certiorari presents no question warranting this Court's attention, and the complaints voiced by petitioner are totally without substance. No question of public interest is involved; indeed, this is nothing more than a routine copyright infringement case properly found to be lacking in merit by the District Court, in a decision unanimously affirmed by the Court of Appeals.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the Constitutional and statutory provisions cited by petitioner, pertinent statutes are:

1. 17 U.S. Code §102(b) which provides:

§102 Subject matter of copyright: In general

* * *

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

2. 17 U.S. Code §103(b) which provides:

§103. Subject matter of copyright: Compilations and derivative works

* * *

(b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

STATEMENT OF THE CASE

Petitioner's statement of the case is both incomplete and inaccurate, particularly when characterizing the development of the questions and answers which comprise part of the *Trivial Pursuit* game. For example, at page 4 of his petition, petitioner states that "1,675 questions and answers from the 'Genus' edition of *Trivial Pursuit* (27.9% of the questions and answers) were taken from *Super Trivia I*". The uncontroverted fact, as pointed out

by the Court of Appeals, 827 F.2d at page 570, is that *none* of the *Trivial Pursuit* questions and answers were "taken from" petitioner's books since those books do not contain any questions and answers, but only alphabetically-arranged compilations of facts.

Respondents do, of course, admit that petitioner's books were among a great number used as reference sources for facts, and that selected facts were used to compose questions and answers. The questions and answers were then divided into categories (e.g., Geography, Entertainment, History, Art and Literature, Science and Nature, and Sports and Leisure), and randomly arranged on cards. The cards were color-coded by category, and one question and answer for each category appeared on each card.

Each game edition utilizes 1,000 cards (for a total of 6,000 questions and answers per edition), and the cards are used in conjunction with a color-coded playing board, dice and tokens.

For its consideration of the summary judgment motions of the parties, the District Court had before it the *Trivial Pursuit* game and marked copies of the petitioner's encyclopedias which identified each alleged instance of use of facts.*

As the following passage from his deposition indicates, petitioner acknowledged that his encyclopedias present information in a straightforward manner with a minimum of creative or stylistic embellishment:

Q My view of these entries is that you seem to be very

---

*Enlarged photocopies of the cover page and pages 1, 4 and 5 of *Super Trivia I* are attached as an appendix to this brief, to illustrate the nature of petitioner's books. These pages, which were included in excerpts of the record filed in the Court of Appeals, contain petitioner's hand-written entries indicating where facts from the book were allegedly used in composing questions and answers for the *Trivial Pursuit* game.

> efficient in the way they're written. In other words, you will provide a heading and then fill the material after that with factual information. Is that correct?
>
> A That's correct.

In the course of explaining the basis of his claim to the Court of Appeals, petitioner stated that:

> . . . in addition to the claim that his exact language has been copied in many instances, Mr. Worth claims a copyright in his selection of the thousands of trivial facts contained in his book.

Regarding the alleged use of his "exact language", petitioner submitted an interrogatory response with accompanying tables setting forth in a "Remarks" column "the exact words, expression, or arrangement of words" found in the game questions and answers. This so-called "exact language" consisted primarily of individual words in common usage, many of which are proper names. For example, petitioner alluded to the use of "WAKE UP" and "EVERLY BROTHERS", referring to the fact that respondents had a question relating to the song "Wake up Little Susie" by the Everly Brothers. Similarly, "WARMUP PITCHES" and "COMING INTO A BASEBALL GAME" were identified as "exact expressions" because Horn Abbot had a question "How many warmup pitches does a reliever get coming into a baseball game?"

As to the copyright infringement claim based on selection of facts, petitioner alleges use of such facts for formulating 1,675 (or approximately 28%) of the *Trivial Pursuit* Genus edition's questions and answers, for 1,293 (or approximately 22%) of the Silver Screen edition's questions and answers, and for 828 (or approximately 14%) of the Baby Boomer edition's questions and answers. Petitioner thus concedes, by inference, that approximately 79% of Horn Abbot's questions and answers (14,204 of 18,000) were based on sources other than his books. To put it another way, and as pointed out by the Ninth Circuit, petitioner alleges use of only 3,796 out of 12,000 factual entries in his two books.

Petitioner concluded that use of his books by Horn Abbot entitled him to at least a $300 million damage award even though he made no claim that his book sales had been affected by the *Trivial Pursuit* game sales. His damage claim was based solely on his speculation that respondents' success prevented petitioner from marketing a successful game.

SUMMARY OF ARGUMENT

Petitioner's copyright infringement position is necessarily based on the proposition that, by selecting and then compiling certain facts into trivia encyclopedias, he obtained copyrights which extend to the facts themselves. Thus, he proposes that designers of a trivia game employing a question and answer format cannot use his books as a source of factual information. He contends that his copyrights on those books preclude use of all or a portion of the information which he selected and included in those books.

Petitioner's position cannot be sustained because (1) the Copyright Act provides that no author may copyright facts, 17 U.S. Code §§ 102(b) and 103(b), and (2) this Court has expressly held that copyright obtained on works including facts "is limited to those aspects of the work – termed 'expression' – that display the stamp of the author's originality." *Harper & Row Publishers* v. *Nation Enterprises*, 471 U.S. 539, 547 (1984).

The test for copyright infringement involves the comparison of the "expression" of the protected work with the "expression" of the alleged infringing work. Other circuits agree with the Ninth Circuit that there is no infringement in the absence of "substantial similarity" of expression, and there is no dispute that, where the protected work is fact-intensive, virtual verbatim reproduction must be demonstrated to establish infringement. *Landsberg* v. *Scrabble Crossword Game Players, Inc.* 736 F.2d 485, 488 (9th Cir., 1984); *Whelan Associates* v. *Jaslow Dental Laboratory*, 797 F.2d 1222, 1236 (3rd Cir., 1986); *Miller* v. *Universal*

Studios, Inc., 650 F.2d 1365, 1369-1370 (5th Cir., 1981); *Hoehling* v. *Universal City Studios, Inc.*, 618 F.2d 972, 979 (2nd Cir., 1980); *Cooling Systems and Flexibles* v. *Stuart Radiator*, 777 F.2d 485, 491 (9th Cir., 1985).

Since mere visual inspection of the respective works establishes that the *Trivial Pursuit* game does not utilize the expression employed in petitioner's encycolpedias, resolution of the cross motions for summary judgment in respondents' favor was unquestionably appropriate. Thus, no reasonable observer could conclude that the respective works were substantially similar and it was entirely correct for the District Court to dismiss this action and for the Court of Appeals to affirm that decision.

ARGUMENT

The decision of the Court of Appeals for the Ninth Circuit in this case is succinctly summarized in the following passage from its opinion (827 F.2d at page 573):

> It is clear, then, that the use of the factual content in Worth's books does not constitute infringement. "The discovery of a fact, regardless of the quantum of labor and expense, is simply not the work of an author." 1 M. Nimmer, *supra*, § 2.11[E], at 2-169. The verbatim repetition of certain words in order to use the nonprotectible facts is also noninfringing; the game cards' repetition of words used by Worth to describe places, persons, and events constitutes "mere *indispensable* expression" of particular facts or ideas. *See Frybarger*, 812 F.2d at 530 (emphasis in original). If we were to hold otherwise, we would, in effect, extend copyright protection to the facts contained in Worth's books. *See Landsberg*, 736 F.2d at 489 (noting that because of the unavoidable expression required to restate the nonprotectible ideas in plaintiff's work, a finding of infringing similarity of expression would effectively grant a copyright in the work's nonprotectible ideas).

That decision is, moreover, clearly consistent with the Copyright Act and with decisions of this Court. Thus, two pertinent sections of the Act (17 U.S.C. §§ 102(b) and 103(b)), ignored by petitioner, deal specifically with the proposition that only an author's expression, and not the preexisting facts utilized in the development of that expression, is protected. This proposition is also emphasized in *Harper & Row Publishers, supra,* 471 U.S. at page 548:

> . . . Yet copyright does not prevent subsequent users from copying from a prior author's work those constituent elements that are not original – for example, quotations borrowed under the rubric of fair use from other copyrighted works, facts, or materials in the public domain – as long as such use does not unfairly appropriate the author's original contributions.

Petitioner's "expression" comprises an encyclopedia format with alphabetically-arranged headings. As petitioner agreed, and as clearly demonstrated by the appendix to this petition, his presentation is fact-intensive and does not involve any literary embellishment.

The setting or "expression" of the *Trivial Pursuit* game, with its color-coded playing board, dice, playing tokens, and color-coded question and answer cards, is remote from the encyclopedia format copyrighted by petitioner. Even when focusing only on the game cards, respondents' "expression" of the factual content is in no respect "substantially similar" to the form utilized by petitioner. Since this is completely apparent from observation of the respective works, it follows that summary judgment in respondents' favor was appropriate. *See* v. *Durang*, 711 F.2d 141, 143 (9th Cir., 1983).

The authorities relied upon by petitioner do not support his proposition that his "selection" is protected independent of the form in which the selection has been expressed. Those cases, typified by *Schroeder* v. *William Morrow & Co.*, 566 F.2d 3 (7th Cir., 1977), stand only

for the proposition that a compilation can be infringed by another work of the same general character. In all of those cases (specifically in the case of the gardening directories involved in *Schroeder*), the protected and accused works were of the same general character – indeed, of competing character.

Petitioner must necessarily argue here that a factual work is infringed simply by use of the facts contained therein, regardless of the form in which the facts are presented in the second work. Petitioner must take that position because respondents used only the facts from petitioner's encyclopedias, adding language necessary to restate the facts in question and answer form. Respondents used none of the objective details which constitute petitioner's expression, and infringement simply cannot be found.

CONCLUSION

There is no statutory or other authoritative basis for extending copyright protection to the lengths proposed by petitioner. The petition is totally lacking in merit and should be denied.

Respectfully submitted,

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APPENDIX

THE
COMPLETE
UNABRIDGED

SUPER TRIVIA ENCYCLOPEDIA

by

Fred L. Worth

BROOKE HOUSE
Los Angeles

A

G711-AL

A

The Scarlet Letter, an "A" embroidered on Hester Prynne's dress, meaning "adultress" (*The Scarlet Letter* by Nathaniel Hawthorne)

A.

Mutt's initial when the comic strip "Mutt and Jeff" began in 1907. Bud Fisher, the original artist, titled it "A. Mutt." On June 7, 1908, Russ Westover killed off A. Mutt, only to bring him back to life. His full name, later: Augustus P. Mutt

A1ANA2

G 152-E

Lawrence Welk's California automobile license plate

A-1 Detective Agency

Jack, Doc, and Reggie's agency (radio series "I Love a Mystery"). Their secretary: Gerry Booker. Motto: "No job too tough, no mystery too baffling"

A 7397664A

Number of the $10. gold certificate that led to the arrest of Bruno Hauptmann (see 4U13-41)

A & M

G 218-E

Record company founded by recording artist Herb Alpert and Jerry Moss. The studio is on the grounds of the Charlie Chaplin studio (1919–1940) at 1416 N. La Brea, Los Angeles

A & P

Great Atlantic & Pacific Tea Company: grocery store chain begun in New York City in 1859. Founded by George Hartford.

A & W

(root beer stands; oldest food franchise (1922)) Barons are Roy Allen and Fred Wright

A. A. Fair

Pen name of Erle Stanley Gardner

ABC Powers

Argentina; Brazil; Chile

A. B. C. D. E. F.

American Boys Club for the Defense of Errol Flynn: defenders of Errol Flynn when accused by teenagers Betty Hansen and Peggy Satterlee of rape. Trial: January and February 1943. William F. Buckley Jr. was a member of A.B.C.D.E.F.

ABO Blood Groups
G 769-SN
A; B; AB—universal recipient; O—universal donor

ANL 709
Arizona license plate number of Marion Crane's 1955 Ford: 1960 movie *Psycho*. She later traded it for a 1957 Ford (California license NFB418) in Gorman.

ASTA
British license plate of Nick and Nora Charles' (Craig Stevens and Jo Ann Pflug) Rolls Royce (1975 T.V. movie "Nick and Nora")

SS 624-ON
SS 99-POR
G 771-AL
SS649 ON
AU1
License plate (18K gold) number of Rolls Royce Phantom 337 owned by Auric Goldfinger (Gert Frobe) (1964 movie *Goldfinger*)

AXE
Government organization for which Nick Carter works: detective novel series *New Adventures of Nick Carter*

Abbey Road
G 490-E
BB660 RPM
G 590-E
BB275-RPM
Apple Record's 1969 Beatle album. Its cover helped further a rumor that Paul McCartney had died in a car accident as far back as 1966. On the cover McCartney is walking barefooted and with his eyes closed. A Volkswagen parked nearby has the license plate number LMW 28IF, supposedly indirectly saying that Paul would have been 28 *if* he had lived. The rumor, of course, proved false. "Abbey Road" was the last album the Beatles recorded together although "Let It Be" was released later.

Abbot
Head of the Friars Club, founded June 1907; Wells Hawk was first Abbot

Abbott and Costello
William "Bud" Abbott and Louis Cristillo: comedy team in radio, then (after 1940) movies. The team split in 1957.
Their "Meet" movies:
SS133-TIT
Meet Frankenstein, 1948 (in Great Britain, . . . *Meet the Ghosts*)
The monster: Glenn Strange
Meet the Killer Boris Karloff, 1949
Meet the Invisible Man, 1951 The Invisible Man: Arthur Franz
Meet Captain Kidd, 1952 Captain Kidd: Charles Laughton
G 290-E
Meet Dr. Jekyll and Mr. Hyde, 1953 Dr. Jekyll: Boris Karloff
Meet the Keystone Kops, 1955
Meet the Mummy, 1955 The Mummy: Edwin Parker

G 9-H
Abel, Colonel Rudolf
Russian spy exchanged February 10, 1962 for F. Gary Powers, U-2 pilot

Aberdeen Express
BB893NN
British train robbed of 7 million dollars (in British currency) on August 8, 1963, in what was called The Great Train Robbery

Abraham Lincoln
Frigate on which Ned Land, Professor Pierre Aronnax, and Conseil were when it was rammed by the "Nautilus" (Jules Verne's *20,000 Leagues Under the Sea*)

Absolute Zero
G 467-SN
−273.16°C, which equals −459.69°F

BB916SS

Academy Awards

Pictures:

G720-E *Rocky*, 1976
SSE33 PRO *One Flew Over the Cuckoo's Nest*, 1975
G411-E → *Godfather II*, 1974
The Sting, 1973
G411-E → *The Godfather*, 1972
The French Connection, 1971
Patton, 1970
Midnight Cowboy, 1969
Oliver!, 1968
In the Heat of the Night, 1967
A Man for All Seasons, 1966
The Sound of Music, 1965
My Fair Lady, 1964
Tom Jones, 1963
Lawrence of Arabia, 1962
West Side Story, 1961
The Apartment, 1960
Ben-Hur, 1959
SS512PRO *Gigi*, 1958 (9 Oscars, 9 nominations)
The Bridge on the River Kwai, 1957
Around the World in 80 Days, 1956
Marty, 1955
On the Waterfront, 1954
From Here to Eternity, 1953
The Greatest Show on Earth, 1952
An American in Paris, 1951
All About Eve, 1950
All the King's Men, 1949
Hamlet, 1948
Gentleman's Agreement, 1947
The Best Years of Our Lives, 1946
The Lost Weekend, 1945
Going My Way, 1944
Casablanca, 1943
Mrs. Miniver, 1942
How Green Was My Valley, 1941
Rebecca, 1940
Gone with the Wind, 1939
You Can't Take It with You, 1938
The Life of Emile Zola, 1937
The Great Ziegfeld, 1936
Mutiny on the Bounty, 1935
It Happened One Night, 1934
Cavalcade, 1932/1933*
Grand Hotel, 1931/1932*
SS77-OFF *Cimarron*, 1930/1931* *(Only Western to win)*

*Award year: August 1 to July 31